SUPREME COURT OF APPEALS OF VIRGINIA.

RICHMOND.

ROSENBAUM'S EX'ORS v. SEDDON.*

April 20, 1897.

1. APPEALS—*Second Appeal—Law of the case.* Questions necessarily involved in the decision of an appeal or writ of error are finally determined by such decision, and are not thereafter open to debate in the trial court, nor generally subject to re-examination in this court on a second appeal, or writ of error, in the same case. The decision on the first appeal, or writ of error, becomes the law of the case.

Error to a judgment of the Law and Equity Court of the city of Richmond, rendered April 30, 1895, in an action of *assumpsit* wherein the defendant in error was the plaintiff, and the plaintiffs in error were the defendants. *Affirmed.*

The opinion states the case.

H. G. Cannon and *Staples & Munford*, for the plaintiffs in error.

Leake & Carter and *Christian & Christian*, for the defendant in error.

RIELY, J., delivered the opinion of the court.

This is the sequel of the case of *Seddon* v. *Rosenbaum*, reported in 85 Va. 928.

Upon the first trial of the case the plaintiff moved the court to give to the jury the following instruction:

"If the jury believe from the evidence that on or about the 11th day of March, 1886, the plaintiff and defendant entered into an agreement by which the defendant agreed to buy 250 shares of the Richmond and Danville Railroad stock and sell the same to the plaintiff at $96 per share, the plaintiff to take the same at the end of three years from the day of the agreement, but with the right to take it at any time prior to the expiration of the three years; and if they further believe that early in the month of July, 1886, the plaintiff or his duly authorized agent demanded delivery of the stock from the defendant and tendered him pay for the same, and that the defendant refused to deliver the said stock, then the jury must find for the plaintiff an amount equal to the difference between the contract price and the market value of the stock at the time of the refusal to deliver the same."

The court refused to give it, and in lieu thereof gave a different instruction. There was a verdict and judgment for the defendant.

* Reported by M. P. Burks, State Reporter.

The plaintiff obtained a writ of error from this court, and assigned as error the refusal of the trial court to give the instruction asked for by him, which is quoted above.

Two objections to the instruction were urged by the defendant in error: First, that the agreement set out in the instruction was one not to be performed within a year, and, not being in writing and signed by the defendant, it was void; and, second, that it was without consideration and void for want of mutuality.

In the brief filed by his counsel in support of the objections made to the instruction there was discussed at length not only the question of the application of the Statute of Frauds, but also the want of consideration and mutuality in the contract, and many of the authorities which were relied on at the hearing of the present writ of error were cited in support of that contention.

The second objection was made in the following clear and unmistakable language, to be found in the brief referred to:

"The instruction asked for by the plaintiff, and refused by the court, proceeds upon the ground that there was a valid contract between the parties, arising upon mutual promises, and that each party was bound thereby.

"The instruction given by the court proceeds upon the ground that there was no valid contract batween the parties; that there was a want of mutuality, and that the defendant's promise to sell and the plaintiff's promise to buy the stock were alike void under the Statute of Frauds.

"The plaintiff, in his petition for appeal, treats the instruction of the court as turning altogether upon the Statute of Frauds. This is a mistake. The instruction also emphasizes distinctly the want of mutuality in the contract."

This court, in its decision, considered both objections, and sustained the correctness of the instruction and thereby the validity of the contract as therein set forth. Much the greater part of the opinion, it is true, is devoted to the discussion of the Statute of Frauds, but, after holding that it was not necessary to the validity of the contract that it should be in writing, the court, speaking through Judge Lacy, who delivered the opinion, said: "But it is further argued that there is an option granted to one side which is not granted to the other, and that there is a want of mutuality. If this is so, then as to all cases where one side grants an option to the other, which is not unusual, the contract is not binding."

And in conclusion the court further said: "We think the Circuit Court clearly erred in rejecting the plaintiff's instruction as asked, and the judgment will, for that cause, be reversed, and the case remanded to the Circuit Court with directions to set aside the verdict

and grant a new trial to the plaintiff, at which new trial, if the evidence shall be the same, and the same instruction asked by the plaintiff, it must be given, and the instruction given by the court at the first trial is erroneous and must not be again given."

It thus plainly appears that the objection of the want of mutuality in the contract, which is the same objection that was so ably presented upon the hearing of the present appeal, was directly made upon the former appeal, and was considered and decided adversely to such contention. The court could not have sustained the correctness of the instruction asked for by the plaintiff on the former trial without deciding against the claim of the invalidity of the contract for want of mutuality, as well as holding it not to be within the Statute of Frauds. By approving the instruction and ordering it to be given to the jury on the new trial, if the evidence should be the same as on the former trial, the court necessarily determined the validity of the contract set forth in the instruction, and the right of the plaintiff to recover upon it. The decision was final and conclusive as to the validity of that particular contract upon any subsequent appeal.

It is conceded in the petition for the writ of error that upon the new trial, had in pursuance of the reversal by this court of the judgment of the Circuit Court, much of the testimony was substantially the same as that adduced on the former trial. The record shows that it clearly proved the agreement, which this court, on the former appeal, had adjudicated to be a legal and binding contract. No different or other contract was shown than that described in the said instruction. The instruction was again asked for by the plaintiff on the new trial, and given by the court. It could not have done otherwise without disobeying the mandate of this court.

The plaintiffs in error, who were the defendants in the lower court, complain that it erred in refusing to give the four instructions asked for by them. Each of their instructions propounds, in substance, the same proposition, and was intended to pronounce against the validity of the contract upon the ground of a want of mutuality, which was the same question passed upon on the hearing of the former appeal. They, in effect, directly controverted the decision then made, and were in conflict with the instruction given for the plaintiff by the trial court in obedience to the mandate of this court. They were, therefore, properly refused.

When the decision of this court on the former appeal was made and certified to the court below, the validity of the contract, as set out in

the instruction pronounced to be right and proper, was no longer open to question by the trial court, or to re-examination even by this court upon a subsequent appeal, at least upon the grounds on which it had been assailed. That decision became to that extent the law of this case, and was final and irreversible. This is well settled by numerous decisions of this court, and of other courts of the highest authority. *Holleran* v. *Meisel*, 91 Va. 148; *Norfolk &c. R. Co.* v. *Mills & Fairfax*, Id. 625; *Chahoon's Case*, 21 Gratt. 822; *Campbell's Ex'ors* v. *Campbell's Ex'ors*, 22 Gratt. 649; *Bank of Old Dominion* v. *McVeigh*, 29 Gratt. 554; *New York Life Ins. Co.* v. *Clemmitt and wife*, 77 Va. 366; *Effinger* v. *Kinney*, 79 Va. 553; *Findlay* v. *Trigg's Admr. et als.* 83 Va. 539; *W. O. & W. R. R. Co.* v. *Cazenove et als.*, Id. 744; and *Turner's Admr.* v. *Staples*, 86 Va. 300.

Our conclusion is that the questions sought to be raised here now are concluded by the decision on the former appeal, and are not open to a new contention. The judgment of the court below must be affirmed.

Affirmed.

RES JUDICATA.

The application of the rule *res judicata* is generally called for in one of two classes of cases. The first where there have been two or more suits between the same parties involving the same subject; and the second where there is but *one suit*, and there have been two or more appeals or writs of error in that suit.

Just what rule is to obtain in determining what is concluded by the first suit, or first appeal, and what matters are still at large, is not easily determined from the Virginia cases. The cases do not seem to be entirely harmonious. The court seems inclined to follow the cases in the Supreme Court of the United States, but an examination of the latter cases discloses the same apparent lack of harmony.

1. *Where there have been two suits between the same parties:*

Until the decision in *Aurora City* v. *West*, 7 Wallace, 82, it had been supposed by some, at least, if not by a majority of the profession, that only those matters were concluded by the first suit which were necessarily involved or decided therein. In other words, that the first suit was a decision on the *precise point* involved in the second, or that the point involved in the second suit was essential to the former judgment. But that case went still further and held that everything was concluded by the first suit, which was open to the party within the legitimate scope of the pleadings, and might have been presented at the trial. The language of the opinion is as follows: "Courts of justice, in stating the rule, do not always employ the same language; but, where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed *in rem judicatam*, and the former judgment in such a case is conclusive between the parties."

"Except in special cases, the plea of *res judicata*," says Taylor, "applies not

only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

Mr. Justice Miller dissented from the majority of the court, and, in the course of his dissenting opinion, said: "It is true that some of the earlier cases speak as if everything which might have been decided in the first suit must be considered concluded by that suit. But this is not the doctrine of the courts of the present day, and no court has given more emphatic expression to the modern rule than this. That rule is, that when a former judgment is relied on, it must appear from the record that the point in controversy was necessarily decided in the former suit, or be made to appear by extrinsic proof that it was in fact decided. This is expressly ruled no less than three times within the last eight years by this court, to-wit: in the *Steam Packet Co.* v. *Sickles*, 24 How. 333; *Same* v. *Same*, 5 Wall. 580; *Miles* v. *Caldwell*, 2 Wall. 35. The principle asserted in these decisions is supported by an array of authority which I will not stop to insert here, but which may be found well digested and arranged in the notes of Hare and Wallace to the *Duchess of Kingston's Case*, 2 Smith's Leading Cases, 791 and seq."

Notwithstanding what is said in the majority opinion, it is believed that an examination of the cases cited by Mr. Justice Miller will sustain what he claims for them. In *Russell* v. *Place*, 94 U. S. 606, Mr. Justice Field delivered the opinion of the court, and, in the course of his opinion, says: "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible." *

All of the judges concurred in this opinion except Mr. Justice Clifford, who delivered the majority opinion in *Aurora City* v. *West*, *supra*. Attention is called to what is said by Mr. Justice Field of the cases of *Washington, Alexandria & Georgetown Steam Packet Company* v. *Sickels*, 24 How. 333, and *Steam Packet Co.* v. *Sickels*, 5 Wall. 580. These are the very cases referred to by Mr. Justice Miller in his dissenting opinion in *Aurora City* v. *West*, and the same view is taken of them. The case of *Aurora City* v. *West* is not mentioned in *Russell* v. *Place*, though the two cases seem to be in irreconcilable conflict.

What has been said of the cases in the Supreme Court of the United States seems to apply with equal force to the decisions of our Court of Appeals. Both

* Substantially the view here expressed is given by Mr. Freeman in his treatise on "Judgments," sec. 258, 2d edition, 1874.

of the cases, *Aurora City* v. *West* and *Russell* v. *Place*, have been cited with approval.

Chrisman v. *Harman*, 29 Gratt. 494, 499, expressly refers to and adopts the view laid down in *Russell* v. *Place*, and quotes with approval the extract above given from that case. *Withers' Admr.* v. *Sims*, 80 Va. 651, 658, adopts the same view, reaffirms *Chrisman* v. *Harman* and *Russell* v. *Place*, and quotes with approval from *Packet Co.* v. *Sickels*, 5 Wall. 580, as follows: "The general rule with respect to the conclusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used in pleading as an estoppel, or is relied upon as evidence, was stated to be substantially this: that, to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined, that is, that the verdict could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter."

Legrand v. *Rixey*, 83 Va. 862, 876–7, is a departure from *Chrisman* v. *Harman* and *Russell* v. *Place*, though both cases are cited to support the opinion. The departure consists in making the first decision conclude not only all matters presented and received, but all matters *presentable* in the first case. With this exception the opinion very nearly quotes from the opinion in *Russell* v. *Place*. But the exception is a very important one. Having quoted from *Russell* v. *Place*, we make the following extract from the opinion in *Legrand* v. *Rixey* in order to show how similar the language is, and yet to note the difference: "It is well settled in Virginia that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. And it is also settled that all matters presented or presentable to *sustain* the particular demand litigated in the prior suit, and all matters presented or presentable *under the issue to defeat* such demand, are concluded by the judgment or decree in such former suit. But to this operation of the judgment or decree, it must appear either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If by the record there be any uncertainty in this respect—as, for example, if it appears that several distinct matters may have been litigated, upon one or more of which the judgment or decree may have passed, without indicating which of them was thus litigated, and upon which the judgment was founded—the whole subject-matter of the suit will be at large and open to a new contention, unless such uncertainty be removed by extrinsic evidence showing the precise point involved and passed upon. And to apply the judgment or decree, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

In *Shen. Valley R. Co.* v. *Griffith*, 76 Va. 913, 925, it is said: "The doctrine of *res judicata* applies to all matters which existed at the time of giving the judgment, or rendering the decree, and which the party had the opportunity of bringing before the court."

In *Fishburne* v. *Ferguson*, 85 Va. 321, 324, the court declares that "this principle embraces not only what actually was determined, but also extends to any other matter which the parties might have litigated in the case." The opinion

cites with approval *Aurora City* v. *West*, but does not refer to the later cases of *Chrisman* v. *Harman* and *Russell* v. *Place*. There are perhaps other cases along the same line, but those cited are sufficient for our purpose, which is to show the conflict in the cases. But, so far as we have observed, in none of the last class of cases cited was it necessary to the decision of the case for the court to have gone so far.

We believe that the true rule, and the one which should be adopted in Virginia, finds expression in the following extract from the opinion of Lacy, J., in *Diehl* v. *Marchant*, 87 Va. 447, 449–50: "It is not necessary to the conclusiveness of the former judgment that the issue should have been taken upon the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment. Every point which has been specifically decided, or by necessary implication an issue which must have been decided, in order to support the judgment or decree, is concluded. The estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or groundwork upon which it must have been founded. It is accordable to reason back from the judgment to the basis upon which it rests, upon the obvious principle that when a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion." Immediately following this quotation there is a sentence which we have intentionally omitted, because, in our judgment, it ought not to be stated as a part of the rule.

If, in the first suit, "the cause of action is divisible or the pleadings involve two distinct propositions, it is competent to show that only one of them was submitted to and passed upon by the jury," and parol evidence is admissible to show what was involved and decided in the first suit. *Allebaugh* v. *Coakley*, 75 Va. 628, 637.

The dismission of a suit on its merits at the hearing, whether on a plea in bar, or demurrer for want of equity, is a bar to another suit for the same subject-matter between the same parties, unless the dismission be without prejudice. *Payne* v. *Grant*, 81 Va. 164, 172–3.

In *Durant* v. *Essex Company*, 7 Wall. 107, it was held that a decree absolute in its terms, dismissing an appeal in equity, is an adjudication of the merits of a controversy and constitutes a bar to any further litigation of the sume subject between the same parties, unless made because of some defect in the pleadings or for want of jurisdiction, or because the complainant had an adequate remedy at law, or upon some other ground that does not go to the merits. And, unless there is some reservation in the order of dismissal, such as *without prejudice*, it is presumed to be rendered on the merits. In view of what is said in *Chrisman* v. *Harman*, 29 Gratt. 494, 501, it may be well doubted whether the presumption above mentioned would be indulged in Virginia.

In *Shumate* v. *Supervisors of Fauquier County*, 84 Va. 574, it was held that a judgment upon a direct point in a former suit is conclusive upon the same point in a later suit though the object of the two suits was different, and the parties not identical—the defendants in the second suit being privies to parties in the first.

2. *Two appeals in same case:*

The second class of cases above mentioned is where there is but one suit, but

there are two or more appeals in that suit. Undoubtedly the Virginia rule is that a decree *affirming* a decree of a lower court finally settles, as between parties to the appeal, all questions which were or *might have been* raised in the appellate court; and on a second appeal all such questions will be concluded by the decision on the first appeal. The decision on the first appeal is binding not only on the inferior court, but on the appellate court, as well. In fact, on all courts, everywhere. It is wholly immaterial whether it is right or wrong, it has become the law of the case, and will be enforced. In addition to the cases cited in the opinion in the principal case see *Howison* v. *Weeden*, 77 Va. 704; *Stuart & Palmer* v. *Preston*, 80 Va. 625; *Carter* v. *Hough, Gray & Co.*, 89 Va. 803; *Lore* v. *Hash*, 89 Va. 277, and *Diamond State Iron Co.* v. *Rarig & Co.*, 93 Va. 595, 603.

But where the decision on the first appeal is one of *reversal*, because of certain specified errors, it is not believed that it should be held conclusive as to matters not noticed, or expressly waived. Nothing is more common than for the court to say that, as the case has to go back for a new trial, for reasons stated, it is unnecessary to pass on other questions raised in the record and argued by counsel. To hold that the decision of the lower court was affirmed on all such questions might work a great injustice to litigants. Of course, the parties are concluded on all questions *passed upon*, whether the decree be one of affirmance or reversal (*Stuart & Palmer* v. *Heiskell*, 86 Va. 191; *Turner's Admr.* v. *Staples*, 86 Va. 300); but to reverse for a *specific error* and to order a new trial ought not to affirm as to all else, neither should it reverse as to all other points. Other questions should simply be at large.

In *Campbell's Ex'or* v. *Campbell's Ex'or*, 22 Gratt. 649, which is a leading case on this subject, although the decree on the first appeal was one of reversal, the court, in speaking of that appeal, says that it "pronounced a decree reversing that of the court below, and *settling forever*, as was supposed, *the principles involved in the cause*, and leaving only an ordinary administration account to be settled" (p. 670). The second appeal, therefore, brought up only questions which had been previously *decided*.

In *Findlay* v. *Trigg's Admr.*, 83 Va. 537, there were two appeals, and the decree on the first appeal was one of reversal. The first appeal involved the question of credits to an administrator for payments made by him in an account settled in the case. Exceptions were filed to the commissioner's report in the Circuit Court, but the report of the commissioner was confirmed, and the Court of Appeals *affirmed* the decree except as to two debts, specially mentioned. On the second appeal the same exceptions had been made in the Circuit Court which had been made prior to the first appeal, and the Court of Appeals, on the hearing of the second appeal, said: "It is true it does not appear that any question as to the validity of those payments was raised in this court, but that does not at all affect the finality or conclusiveness of the decree which was entered. In other words, the matter is *res judicata*, and that without regard to the soundness of the objection, had it been insisted on at the proper time."

Here, therefore, there was a distinct *affirmance* in the particular matter sought to be reopened, and the court declared that matter *res judicata*.

Again, in *New York Life Ins. Co.* v. *Clemmitt and wife*, 75 Va. 366, there was a second writ of error in the same case. On the first writ of error (77 Va. 355) the judgment of the Circuit Court was reversed, but, though reversed, the court

passed upon the instructions which had been argued in the court below, and the second writ involved the consideration of the same instructions, or instructions to the same effect, and it was held to be the settled rule that decrees of the Court of Appeals on questions decided by the court below are conclusive, and on second appeal these questions cannot be raised again. In other words, that on the first appeal the same questions were involved as those brought up for consideration on the second.

In *Norfolk &c. R. Co.* v. *Mills & Fairfax*, 91 Va. 613, there was a second writ of error in the same case, and the judgment was one of reversal on the first writ, but it was the same contract which the court was called upon to construe on each writ, and on the second writ the court declared itself bound by the construction given on the first. A similar decision was made in *Holleran* v. *Meisel*, 91 Va. 143.

In all of these cases the question raised on the second appeal was one which had been *decided on the first.* In none of them was the reversal on one point held to be an affirmance on all others.

But there are several Virginia cases, which, as we understand them, do hold, that, though the first decree be one of *reversal*, yet all points not passed on are concluded by the decree on the first appeal. In *McCullough* v. *Dashiell*, 85 Va. 41 (decided by a court of three judges), it is said: "And although this court may be of opinion that it is only necessary to notice certain questions as they are decisive of the case, yet all questions involved in the appeal are finally adjudicated, whether distinctly raised and passed on below and here or not. If they are involved and might have been passed on, it is enough." It will be seen by examination of the report of the first appeal (78 Va. 634) that the court, both in the opinion and the decree, went quite fully into, and passed upon, the questions involved. Upon the second appeal it ruled adversely to the appellees on the new questions raised, and held the former decision to be conclusive as to all questions then presented, or which might have been, but were not. Here, again, *Aurora City* v. *West* is cited with approval, though that was not a second appeal in the same case. A like doctrine is announced in *Krise* v. *Ryan*, 90 Va. 711.

The opinion in the principal case is a very clear and able exposition of the law in that class of cases, and we think is plainly right. There was no occasion to deal with other questions discussed in this note, but we doubt not that when these questions do arise the court will deal with them with its usual intelligence and ability.

The rule of *res judicata* is not applied to findings of fact by the appellate court. Parties are not bound by these where a new trial is ordered, but may show that the facts are otherwise than the court has stated them, and, generally, may introduce new evidence upon the issues joined.

But if the evidence is identically the same on both trials the rule applies, and the judgment on the first trial becomes as much the law of the case as if it had on a question of law. This was expressly held in *Carper's Adm'r* v. *Norfolk & W. R. Co.*, decided at Wytheville, July 15, 1897, in which Judge Keith delivered the opinion of the court.

M. P. BURKS.